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MEMORANDUM

SUBJECT: Successor Liability in the Kolomoki Plantation Case

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THRU: Angelia Blackwell, Chief
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I. *Introduction*

This memorandum outlines the law likely to be applied by an Administrative Law Judge when addressing the issue of successor liability, in general, and as applied to the facts of the In the Matter of Kolomoki Plantation, LLC, et al., Docket No. FIFRA-04-2002-3034, case. More specifically, this memorandum analyzes the likely standard for successor liability that will be applied to a limited liability corporation in Georgia whose predecessor violated the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").

On September 30, 2002, Region 4 filed an administrative Complaint against Fred Wenzel, John Ray Stout, Kolomoki Plantation, LLC, Kolomoki Creek, LLC and KP, LLC for FIFRA violations committed on the Kolomoki Plantation property in 1998 and 1999. Since the filing, James Butler, on behalf of Kolomoki Creek, LLC, now known as Kolomoki Plantation, LLC (hereafter collectively referred to as "Kolomoki Creek"), has strenuously objected to the naming of these two entities in the Complaint. Mr. Butler believes that since Kolomoki Creek is a successor corporation and did not exist at the time of the violations, it cannot be held liable for the deeds of its predecessor, Kolomoki Plantation, LLC, now known as KP, LLC (hereafter collectively referred to as "KP, LLC"). In support of his claim, Mr. Butler has submitted real estate transaction documents related to the sale and

acquisition of Kolomoki Plantation. These documents have been forwarded to the National Enforcement Investigation Center (NEIC) for review to determine whether these documents themselves suggest that liability passed to Kolomoki Creek, or whether they indicate that the sale was for inadequate.

This document assumes there has been a valid asset purchase and no explicit assumption of liability by Kolomoki Creek. It examines the FIFRA statute and general administrative case law, then focuses on the general rule of successor liability and two varieties of one exception to this general rule: the mere continuation and substantial continuation standards. The memorandum then looks at the struggle between the circuit courts as they decide to follow either federal common law (substantial continuation standard) or state law (mere continuation standard) or both. Finally, this memorandum presents options and issues pertaining to whether EPA should continue to pursue Kolomoki Creek or drop them from the Complaint.

II. Relevant Facts Pertaining to Kolomoki Creek's Purchase of KP, LLC

The Kolomoki Plantation ("Plantation") consists of approximately 4,000 acres, of which about half is used as a working farm raising crops such as peanuts, corn and cotton. The other half of the Plantation is used for timber leasing and quail hunting. In 1998 and 1999, the Plantation injected chicken eggs with Furadan 4F and placed these eggs throughout the quail hunting portions of the Plantation in order to control the natural predators of quail.

At the time of the alleged violations, the Plantation was owned by Kolomoki Plantation, LLC., which in turn was owned by Mr. Fred Wenzel. The Plantation manager at the time was Mr. John Ray Stout. He directed the use of Furadan 4F and was also a "certified applicator" able to obtain the pesticide. Through publically accessible documents, Region 4 determined that several corporate transactions occurred involving the companies that owned the Plantation and the real estate in 2001, but that the buying and purchasing companies appeared to be intertwined and liable as successors. Therefore, Region 4 named not only Kolomoki Plantation, LLC (currently known as KP, LLC), Fred Wenzel, and John Ray Stout, but also named Kolomoki Creek, LLC (the company that initially purchased the Plantation) and Kolomoki Plantation, LLC (the current name of Kolomoki Creek, LLC which it took after the original Kolomoki Plantation, LLC changed its name to KP, LLC). Therefore, Region 4 named what appeared to be successor corporations in the Complaint.

Since the time that the Complaint was filed, Kolomoki Creek, LLC and Kolomoki Plantation, LLC (collectively referred to as "Kolomoki Creek") claim that since Kolomoki Creek was created in 2001, after the violations occurred (1998 and 1999), Kolomoki Creek should not be named in the Complaint. Kolomoki Creek claims that it purchased only the assets of the Plantation and that no liabilities passed in the sale. KP, LLC, which is now likely an empty shell of a corporation, agrees that this was solely a sale of assets and that there is no relation between the companies.

Additionally, there are other entities that were involved in this sale between the original Kolomoki Plantation, LLC and Kolomoki Creek. According to Butler, in April 2001, Kolomoki Plantation, LLC sold the Plantation property to Kolomoki Creek, LLC, and the farm assets to Kolomoki Farms, LLC. Additionally, Kolomoki Timber Resources, LLC (also owned by Fred Wenzel) sold the timber leases on the Plantation to Kolomoki Timberlands, LLC. As part of the deal, Kolomoki Plantation, LLC agreed to change its name to KP, LLC, so that Kolomoki Creek, LLC could then change its name to Kolomoki Plantation, LLC. Although the owners changed names, there are multiple similarities between the old companies and the new companies, e.g. same name, same land, same business (operations never ceased), same employees (now employed by Kolomoki Farms, LLC), and same supervisory personnel.

III. FIFRA and Administrative Case Law

Sections 14(a)(1) and (2) of FIFRA, 7 U.S.C. §§ 136*l*(a)(1), (2), hold registrants, private and commercial applicators, wholesalers, retailers, dealers and other distributors in the pesticide industry liable for penalties for violations of the Act. Section 14(b)(4) of FIFRA, 7 U.S.C. §§ 136*l*(b)(4), also provides for the assessment of a civil penalty against agents, officers, or other persons who by their acts or omissions on behalf of the employer violate the terms of FIFRA. The Act does not, however, address or define liability in terms of corporate forms or successors.

EPA Administrative Law Judges have held successor corporations liable for violations by their predecessors in enforcement proceedings. See, In the Matter of Heating Oil Partners, L.P., Docket No. CWA-III-199 (ALJ, September 21, 1998) (held: corporate successor who continued to violate Clean Water Act liable for civil penalties where successor corporation was a substantial continuation of its predecessor); In re Microft Systems International Holdings, S.A., Docket No. FIFRA-93-H-03 (ALJ, July 15, 1994) (held: corporate successor jointly and severally liable in light of FIFRA's purpose to regulate pesticides for the protection of the environment); In re Gary Busboom, Docket No. FIFRA-09-06-41-C-89-06 (ALJ, Oct. 17, 1991) (held: corporate successor liable under FIFRA where successor corporation a mere continuation of its predecessor). However, in doing so, Administrative Law Judges have looked for guidance from federal and state court jurisdictions where the subject violation(s) occurred. Thus, although the law on successor liability may be favorable in one circuit or state court, the most influential law in the Kolomoki case will most likely be that of the 11th Circuit and Georgia State Courts.

IV. General Rule

In general, "where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. . . However, the doctrine of successor liability permits exceptions to the general rule in four specific instances: when (a) the purchaser expressly or implicitly agrees to assume liability; (b) the purchase is a de facto consolidation or merger; (c) the purchaser is a mere continuation of the seller; or (d) the transfer of assets is for the

fraudulent purpose of escaping liability." U.S. v. Exide Corp., 2002 U.S. Dist. LEXIS 3303, 11 (ED Pa 2002). Corporate successor liability prevents corporations from evading their liabilities through changes in ownership when there is a buyout or merger. State of Washington v. U.S., 930 f. Supp. 474, 477 (W.D. Wash. 1996).

NEIC reviewed the documents related to the sale of the business and property of Kolomoki Plantation, LLC, now known as KP, LLC to Kolomoki Creek, LLC. NEIC did not discover any new information that would lead EPA to believe that there is anything in these documents that indicates that liability passed to the purchasing company. Therefore, it appears that three of the exceptions to the general rule of successor liability, outlined above, do not fit the facts of the Kolomoki case. Specifically, there does not appear to be an agreement, express or implied, for Kolomoki Creek, LLC to assume any of the liabilities of KP, LLC, other than a mortgage debt. The documents provided by Mr. Butler, as well as the statements of Mr. Butler and Mr. Truitt Martin (representing KP, LLC) support this conclusion. In addition, this does not appear to be a fraudulent transfer of assets because of the large amount of money that changed hands. Lastly, the purchase probably cannot be labeled as a de facto consolidation or merger since ownership of the plantation, business and assets changed from KP, LLC (owned completely by Mr. Wenzel) to Kolomoki Creek, LLC (owned completely by Mr. Butler and his wife).

Based on the facts related to the sale between KP, LLC and Kolomoki Creek, LLC as EPA currently knows and understands them, it appears that the only argument for successor liability in this case is that Kolomoki Creek, LLC was a mere continuation of KP, LLC. Therefore, the remainder of this memo focuses on the mere continuation exception to the general rule that a successor corporation is not liable for the debts and liabilities of its predecessor.

The "mere continuation" exception to the general rule has been accepted by most states and jurisdictions as a valid theory to pursue a successor corporation for the acts of its predecessor. However, the states and jurisdictions support different variations of this exception, and many disagree on how broadly this exception should be construed. The major difference between the jurisdictions is whether the continuation exception requires some commonality in ownership between the predecessor and successor companies. The "mere continuation" exception is generally considered to require some commonality in ownership and is considered to be the more traditional state standard. However, using federal common law, many jurisdictions have broadened this exception to instances where there was no commonality in ownership if other factors were present. This theory is commonly referred to as the "substantial continuity" standard. These two variations of the continuation exception are discussed in detail below.

A. Mere Continuation Standard

The key element of the mere continuation exception is a common identity of the officers, directors, and stockholders in the selling and purchasing corporations. "Employment of the selling

business entity's officers by the successor corporation is not enough — there must be a transfer of stock." Baker's Carpet Gallery, Inc. v. Mohawk Ind, Inc., 942 F. Supp. 1464, 1471 (N.D. Ga. 1996). In Baker's, the plaintiff showed no evidence of any transfer of stock and consequently, the court held that the defendant could not invoke the mere continuation exception. Id. at 1471. See also, In the Matter of Heating Oil Partners, 1998 EPA ALJ LEXIS 81 (1998) (The mere continuation exception has "traditionally required a showing of continuity in stock ownership between the selling and purchasing companies); Gould, Inc. v. A & M Battery and Tire Service, 950 F.Supp. 653, 656 (M.D. Pa. 1997) (held: the defendant was not a successor corporation under the mere continuation doctrine because there was no continuation of stockholders between the companies and there was no overlap of stock ownership among the corporations); U.S. v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992) (held: substantial continuity test appropriate because under the traditional approach of mere continuation, where there was no overlap of stock ownership between two companies, the successor company would not have been held liable).

B. Substantial Continuity Standard

Some courts have broadened mere continuation to include the theory of "substantial continuity" (also referred to as "continuation of the enterprise"). Exide, at 12; U.S. v. Carolina Transformer Co., 978 F.2d 832, 837-838 (4th Cir. 1992). Although sometimes included under mere continuity discussions, substantial continuity is recognized as being easier to meet than the "mere continuation" exception. Exide at 12. Rather than making the existence of a single corporation and identity of stock, stockholders, and officers determinative, the court considers other factors as well. State of Washington v. U.S., 930 F. Supp. 474, 478 (W.D. Wash. 1996). Those factors typically include:

(1) retention of the same employees;
(2) retention of the same supervisory personnel;
(3) retention of the same production facilities in the same location;
(4) retention of the same name;
(5) production of the same product;
(6) continuity of assets;
(7) continuity of general business operations; and
(8) whether the successor holds itself out as the continuation of the previous enterprise.

Id. at 478; Gould at 657.[1]

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[1]This substantial continuity approach is grounded on sound principles arising from a number of Supreme Court cases involving successor liability under labor law statutes. In Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973), the Supreme Court ruled that a successor's liability for unfair labor practices under the federal labor law must be governed by federal rules designed to "effectuate the policies" of that statutory scheme. 414 U.S. at 176, 184-85. The Court, after carefully examining

Some courts have also looked at knowledge or actual notice of a seller's liability as an additional factor to help show substantial continuity. In Oner II v. EPA, 597 F.2d 184 (9th Cir. 1979), the court did not explicitly discuss mere continuation or substantial continuation. However, the court upheld extending FIFRA liability to a successor corporation, noting that the successor corporation had notice of an outstanding debt to the EPA. There, the owner of the successor corporation served as president of both the original corporation and the successor corporation. Id at 186. The court also noted that Oner II was formed to continue distributing pesticides, maintained the same personnel in a responsible position, and Oner II in fact was engaged in the business of distributing pesticides.

Likewise, U.S. v. Mexico Feed & Seed Co., 980 F.2d 478 (8th Cir. 1992) has been interpreted by some courts as requiring knowledge of potential liability under the substantial continuation theory. In that case, the court found that the successor corporation (defendant) was not liable because it had no knowledge of CERCLA violations nor had the predecessor corporation been identified as a potentially responsible party for CERCLA purposes. Id. at 489. However, most courts have found that knowledge and/or notice do not play a part in finding a successor liable for the acts of its predecessor. See e.g., Gould, Inc. v. A & M Battery and Tire Service, 950 F. Supp. 653, 658-659 (M.D. Penn. 1997) (knowledge need not be present for successor corporate liability to attach in CERCLA context). In fact, the court in Gould criticized another district court for its holding in United States v. Atlas Minerals and Chemicals, Inc., 824 F. Supp. 46 (E.D. Pa. 1993), which required knowledge and/or notice of liability based on its interpretation of Mexico Feed & Seed. The Gould court stated:

> We are of the opinion that the reason for such misinterpretations of the Mexico Feed and Seed decision is because in the majority of cases where the continuity of enterprise theory has been applied, the parties have been intertwined at some level or another. In such situations, it is easy to find that the parties knew of such liability because of the closeness among the corporations. If the factors of the continuity of enterprise theory are present, then, in substance, the corporation is continuing the business of its predecessor, for it is holding itself out to be the same corporation, and the end result is merely the same corporation wearing a new hat under the guise of the successor corporation.

Gould at 659.

V. Federal Common Law vs. State Law

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those policies, agreed with the NLRB that it should apply a federal rule of decision imposing successor liability "[w]hen a new employer ... has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations." Id. at 184.

Discussions regarding the use of mere continuation or the broader substantial continuation standard revolve around whether a court should invoke state rather than federal common law. As stated above, the mere continuation theory is generally considered to be the standard under most state law, whereas the substantial continuation theory is based in federal common law. The United States Supreme Court in U.S. v Kimbell Foods, Inc., 440 U.S. 715, 727-728 (1970), stated, "controversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." To determine if federal common law is the appropriate standard in the absence of an explicit federal statutory standard, the Court created a three-part test. Id. at 728-729. The test requires the consideration of: 1) the need for a nationally uniform body of law, 2) whether application of state law would frustrate specific objectives of the federal programs, and 3) the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. Id.

Generally, the broadening of the mere continuation exception to include substantial continuity has occurred in public policy contexts such as in CERCLA litigation to prevent successor corporations from avoiding responsibility to pay for the cleanup of hazardous waste sites. In the CERCLA context, the following Circuits have adopted the federal common law approach to successor liability: **Second**, B.F. Goodrich v. Betkoski, 99 F.3d 505, 509 (2d Cir. 1996); **Third**, Smith Land & Improvement Association v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988); **Fourth**, United States v. Carolina Transformer Co., 978 F.2d 832, 837-838 (4th Cir. 1992); and **Eighth**, U.S. v. Mexico Feed & Seed Co., 980 F.2d 478, 486-487 (8th Cir. 1992).

The following circuits rejected the federal common law standard: **First**, U.S. v. Davis, 261 F.3d 1 (1st Cir. 2001); **Sixth**, Anspec Co., v. Johnson Controls Inc., 922 F.2d 1240, 1245-1247 (6th Cir. 1991) and City Mgmt Corp. v. U.S. Chem. Co., 43 F.3d 244 (6th Cir. 1994); and **Ninth,** Atchison, Topeka and Santa Fe Railway co., v. Brown & Bryant, Inc., 159 F.3d 358, 362-365 (9th Cir. 1998). Significantly, there were two Atchison decisions. In the first, a single panel of the Ninth Circuit purported to overrule its decision in Louisiana-Pacific Corp. v. ASARCO, Inc., 909 F.2d 1260 (9th Cir. 1990) (applying federal common law to questions of successor liability under CERCLA), concluding that O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) and Atherton v. FDIC, 519 U.S.213 (1997) refuted the wisdom of fashioning federal common law.[2] The Ninth Circuit *withdrew* this decision, however, and issued an amended decision to take its place. Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358 (9th Cir. 1998). In its amended decision, the Ninth Circuit stated, "we need not determine whether state law dictates the parameters of successor

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[2]O'Melveny & Myers and Atherton are two U.S. Supreme Court cases that held that state law should provide the rule of decision in suits brought by the Federal Deposit Insurance Corporation for actions sounding in tort (i.e. negligence fiduciary duty). See Atchison, 132 F.3d 1295, 1301 (9th Cir. 1997).

liability under CERCLA. This is so because we choose not to extend the 'mere continuation' exception to include the broader notion of 'substantial continuation.'" Id. at 364. Later in the opinion, the court concludes its discussion on this topic by stating, "thus, there is no 'substantial continuation' exception in this [Ninth] circuit." Id. at 364.[3]

In courts where the federal common law approach of using substantial continuation in CERCLA cases, commonly the reasoning is, in part, because CERCLA is a strict liability statute. Baker's at 1472. Likewise FIFRA is a strict liability statute. See, In the Matter of Monsanto Company and Simpson Farm Enterprises, Inc., Docket No. I.F.& R.-VII-1193C-93P, 1995 EPA ALJ LEXIS 94, 21 ("FIFRA has been held to be a strict liability statute. . . A person violating a provision of the statute is subject to civil penalties and intent or good faith is immaterial. . .holding FIFRA to be a strict liability statute is a permissible construction of the Act and that this long standing interpretation would be upheld by the courts.").

A. Georgia

No Eleventh Circuit or state court decisions have specifically addressed the use of substantial continuation (federal common law) for successor liability for limited liability corporations in the context of CERCLA or FIFRA. However, in Redwing Carriers v. Saraland Apts., 94 F.3d 1489, 1501-1502 (11th Cir. 1996), the Eleventh Circuit rejected the adoption of the substantial continuity doctrine regarding limited partner liability under CERCLA and instead addressed limited partner liability using state law. Based on the Court's reasoning, it is likely that it would use the same standard with respect to limited liability corporations.

The appellees in Redwing were a group of investors, the most recent owners, who bought the company and formed a limited partnership. The court addressed the three-part test under Kimbell Foods but reasoned that the facts in Redwing supported the use of state law, not federal common law, to determine the liability of partners under CERCLA. For example, the court was not persuaded that a uniform federal rule need govern limited partner liability under CERCLA because there was no showing that state partnership law was inadequate to achieve the goals of CERCLA. Redwing at 1501. Second, the court determined that state rules governing the liability of limited partners was not in conflict with CERCLA's goals. Id. In coming to that conclusion, the court referred to the Sixth Circuit's holding in Anspec Co. v. Johnson Controls, Inc., 922 F2d 1240 (6th Cir. 1991), that state law should be applied to corporate dissolution and merger as a federal decision rule under CERCLA. The Sixth Circuit reasoned that "most states have counterparts to CERCLA and the EPA and they share

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[3]However, see Oner II, Inc. v. United States Environmental Protection Agency, 597 F.2d 184 (9th Cir. 1979) (successor company liable under FIFRA without commonality of ownership when there was notice of liability) (supported in Louisiana-Pacific Corp., v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990)).

complementary interests with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination." Redwing at 1502 (quoting Anspec at 1250).

Finally, the Redwing court held that the third factor in Kimbell Foods , was most persuasive in favor of state law. The court was concerned about the impact abandoning state law on limited partnership liability would have on "[corporate] relations grounded on state law." Id. at 1502. The court was unwilling to "upset the expectations investors have under current state law rules by adopting a federal common law rule." Id. at 1502. See also, Southfund Partners III v. Sears, Roebuck, and Co., 57 F. Supp. 2d 1369, 1376 (N.D. GA 1999) (holding that Georgia law [not federal common law] governed the determination of whether an 'as is' clause in a sales contract released a corporation from CERCLA liability); Baker's Carpet Gallery, Inc. v. Mohawk Ind, Inc., 942 F. Supp. 1464, 1472-1473 (N.D. Ga. 1996) (declining to adopt the substantial continuity exception as "a necessary means of achieving the policies and objectives of antitrust law" stating that the tendency of the substantial continuity exception is to "brush aside" the "bedrock" requirement of causation).

VI. Supreme Court Decisions

Relying on United States v. Bestfoods, 524 U.S. 51 (1998), the application of federal common law to successor liability might be challenged. In Best Foods, the Supreme Court was resolving a conflict among the Circuits over the extent to which a parent corporation may be held directly liable under CERCLA for operating facilities ostensibly under the control of its subsidiary. However, the Supreme Court specifically declined to rule on the issue of whether state or federal common law applies for indirect successor liability cases under CERCLA. Bestfoods at 63, n.9.

Nevertheless, the First Circuit's dicta in Davis stated that Bestfoods "left little room for the creation of a federal rule of liability under the statute." Davis at 124. However, two recent District Court decisions involving successor liability under CERCLA have found Bestfoods "specifically declined to rule on the issue of whether state or federal common law applies for indirect successor liability cases under CERCLA, 524 U.S. at 63 n.9." United States v. American Scrap Co., et al., Civil Action No. 99-CV02047 (M.D. Pa. May 24, 2001), at 6; W.R. Grace & Co.- Conn. v. Zotos International, Inc., No. 98-CV-8385(F), 2000 WL 1843282 6 (W.D.N.Y. Nov. 2, 2000) ("the Supreme Court did not hold in Bestfoods that state law governed the issue of successor liability in a CERCLA action" (citation omitted)).

In a CERCLA case involving a government plaintiff, yet another District Court declined to accept the argument that, in light of Bestfoods, "the 'substantial continuity' test should now be abrogated, and state corporate law standards for successor liability should be employed." State of New York v. National Services Industries, Inc., 134 F. Supp. 2d 275, 278, n.4 (E.D.N.Y. 2001). The District Court relied on the Second Circuit's decision in Betkoski, 112 F.3d at 91, in which the Second Circuit affirmed its earlier decision, noting "our primary reason for adopting a federal common law rule was our concern that allowing state rules such as the inflexible and easily evaded 'identity' rule

to control the question of successor liability would defeat the goals of CERCLA." National Services Industries, Inc., 134 F. Supp. at 278, n.4. The District Court went on to note that "application of the federal 'substantial continuity' test to CERCLA actions in no way frustrates the policies or interests underlying state corporate law." Id.

In addition, the Supreme Court has had occasion to examine the circumstances in which the federal courts are to look to federal common law, rather than state law, in cases involving federal interests. See, Atherton v. FDIC, 519 U.S. 213 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). Both of those cases held that state law should provide the rule of decision in suits brought by the Federal Deposit Insurance Corporation for actions sounding in tort (i.e. negligence fiduciary duty). Significantly, neither Atherton nor O'Melveny & Myers dealt with claims brought under a federal statute.

VII. Georgia State Law Regarding Mere Continuation

Georgia adheres to the general rule that a successor does not assume the liabilities of the predecessor unless:

(a) there is an express agreement to assume the liabilities;
(b) the transaction is a fraudulent attempt to avoid liability;
(c) the purchaser is a mere continuation of the predecessor corporation; or
(d) the transaction is, in fact, a merger

Perimeter Realty v. Gapi, Inc., 533 S.E.2d 136, 145 (Ga. App. 2000); Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga. 1985).

The Georgia Supreme Court in Bullington (products liability case) held that mere continuation criterion was not met because in Georgia, "common law continuation theory has been applied where there was some identity of ownership." Id. at 727. There, the sale was for adequate consideration and not for an exchange of stock and there was no common ownership in the two companies. The court, in dicta, also acknowledged other factors that appear necessary to find mere continuation such as the new corporation operated with many of the same employees, at the same location, and with a similar company name. Bullington at 728.

As noted above in the Mere Continuity section, a Georgia district court in Baker's set out that the key element of mere continuation is commonality of ownership in the selling and purchasing corporations. Baker's at 1471. Notably, complete identity of ownership is not required. Pet Care Professional Center v. Bellsouth Advertising & Pub. Corp., 464 S.E.2d 249, 250 (Ga. App. 1995). In

Pet Care, three of the Center's four partners became stockholders in Pet Care and therefore, the identity of ownership criterion was met. Id. at 251.

VIII. Analysis of Kolomoki Creek's Liability as a Successor of KP, LLC

The present facts known regarding Kolomoki Creek's purchase of the business and property known as Kolomoki Plantation clearly fit within the "substantial continuity" standard of successor liability, given that all eight factors typically looked at by courts are present in this case. Kolomoki Creek retained the exact same employees as KP, LLC; retained the same supervisory personnel; the same production facilities in the same location; the same name; produced the same product (in fact, there were crops in the ground at the time of purchase); there was a complete continuity of assets; a complete continuity of general business operations; and Kolomoki Creek clearly holds itself out as a continuation of the previous enterprise.

However, based on the review of 11th Circuit decisions, it seems unlikely that the "substantial continuity" standard will be the standard used by an Administrative Law Judge when assessing violations committed in Georgia under FIFRA. Instead, an ALJ will likely apply the "mere continuity" standard. The distinct difference between the "mere continuity" and "substantial continuity" standards is similarity of shareholders, and the known facts about the Kolomoki case indicate that there was no similarity in ownership between KP, LLC and Kolomoki Creek, LLC. Therefore, if the mere continuity standard is applied in the Kolomoki case, it is virtually certain that Kolomoki Creek, LLC will not be held liable as a successor to KP, LLC.

Notwithstanding, the 11th Circuit has never addressed successor liability in the FIFRA context. Thus, EPA could make a strong argument that holdings from other circuits specifically addressing this issue should be followed. The case most on point seems to be the Oner II case (Ninth Circuit case), given that it was a FIFRA case and the court determined that the successor should be held liable for the acts the predecessor corporation even though there was no commonality in ownership. As stated above, this case focused on knowledge and/or notice of the liability and this, in a sense, resulted in the application of a broader "substantial continuity" standard. However, the Oner II court did not directly address the issue of mere versus substantial continuity, and therefore really can't be used as support for such an argument in the Kolomoki case. Further, the Oner II case was in 1979, and a more recent 1998 decision by the Ninth Circuit in Atchinson closes the door of for any argument that the Ninth Circuit supports a "substantial continuity" standard. The Ninth Circuit found that "we need not determine whether state law dictates the parameters of successor liability under CERCLA. This is so because we choose not to extend the 'mere continuation' exception to include the broader notion of 'substantial continuation . . . thus, there is no 'substantial continuation' exception in this [Ninth] circuit.".' Atchinson at 364. Therefore, it appears that the only argument that can be made using the Oner case is that, if the successor corporation had knowledge of the outstanding debt to EPA, then this knowledge combined with the other continuity factors may be enough to hold the successor liable even when there is not a similarity in ownership.

Furthermore, as stated in Oner II, "[t]he EPA's authority to extend liability to successor corporations stems from the purpose of the statute it administers, which is to regulate pesticides to protect the national environment." Oner II at 5 (citing S. Rep. No. 92-838, 92d Cong., 2d Sess., Reprinted in (1972) U.S. Code Cong. & Admin News, pp. 3993, 3995). "The Agency may pursue the objectives of the Act by imposing successor liability where it will facilitate enforcement of the Act." See, Golden State Bottling Co. v. NLRB, 414 U.S. 168, 179-80 (1973); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975). Such language regarding the purpose of FIFRA supports holding Kolomoki Creek, LLC liable as a successor to KP, LLC.

On the issue of notice, the facts in the Kolomoki case do support an argument that Kolomoki Creek, LLC (through Mr. Butler) had notice of the potential liability under FIFRA. Mr. Butler was well aware of the violations committed on Kolomoki Plantation. In fact, Mr. Butler was on the Board for the Georgia Department of Natural Resources ("DNR") at the time that the investigations of the plantations were taking place, and is still an active member of the Board. Additionally, there has been some indication that Mr. Butler was somewhat involved with cutting these investigations short. Mr. Butler admits that he was aware of the violations, and claims that he encouraged active investigation of this activity. He also claims that before purchasing Kolomoki Plantation he had called a member of DNR to ensure that the cases had been concluded. Based on these facts, EPA could make an argument that Mr. Butler was aware of the potential liability, but EPA cannot argue that he had notice of an outstanding debt to EPA because EPA had not brought an action prior to his purchase of Kolomoki Plantation. Therefore, EPA could make an argument of successor liability based on the Oner II case given that this is a FIFRA case also and there is some element of notice. However, this argument would be very uncertain in light of the fact that most jurisdictions do not view notice as a determining factor for successor liability.

Further, the facts in the Oner II case also appear to be stronger on the issue of commonality between the corporations. The owner of Oner II was the president of both the predecessor and successor corporations, though he only had ownership interest in Oner II. Whereas, based on the evidence currently known to EPA, Mr. Butler had no formal business relation to KP, LLC prior to his purchase of Kolomoki Plantation.

In conclusion, though the facts of the Kolomoki case show that Kolomoki Creek, LLC was in virtually every manner a continuation of the business owned by KP, LLC, the key element that is probably necessary to show successor liability in this circuit is missing — common ownership. An ALJ looking at FIFRA violations in Georgia will almost certainly apply the "mere continuation" standard rather than the broader "substantial continuation" standard. Therefore, unless EPA is willing to make a risky argument that the 11th Circuit should apply federal common law under these circumstances, EPA should remove Kolomoki Creek, LLC and Kolomoki Plantation, LLC from the complaint.